

United Steelworkers of America, Local 4671 (National Oil Well, Inc.) and Calvin Eugene Dugger. Case 16-CB-3424

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 26, 1990, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The Respondent, United Steelworkers of America, Local 4671 (the Respondent or Local 4671) and National Oil Well, Inc. (the Employer or National Oil Well) are parties to a collective-bargaining agreement effective from November 1, 1988, to April 30, 1992. The agreement does not contain any provision requiring union membership, but provides that employees who become members of Local 4671 may authorize the Employer to make monthly monetary deductions from their paychecks in amounts equal to periodic union dues, and remit those amounts to Local 4671, by executing a dues-checkoff authorization card.

Charging Party Calvin Eugene Dugger was a member of Local 4671 and executed a checkoff authorization card on April 14, 1988.² On April 14, 1989,

Dugger notified Local 4671 by letter of his request to terminate his union membership. The letter did not, however, mention anything regarding revocation of dues checkoff. Local 4671 accepted the letter as Dugger's resignation from the Union.³

At a subsequent date unspecified in the record, Dugger inquired of Union Vice President Jay Bailey why his dues were still being withheld following his resignation. Bailey responded that any problem regarding Dugger's dues checkoff should be directed to the Employer's director of personnel, Bob McCreary. Thereafter, on July 20, 1989, Dugger sent a letter to McCreary requesting that the Employer cease making dues payments to Local 4671. McCreary declined to do so because Dugger's July 20 request was not made within the permissible revocation period set forth in his dues-checkoff authorization.

The judge found that, under the rule set forth in *Marichinists Local 2045 (Eagle Signal)*,⁴ Dugger's resignation from Local 4671 operated to revoke his dues-checkoff authorization. The Board held in *Eagle Signal* that resignation of union membership will revoke a checkoff authorization, even if the resignation does not occur during the allowable revocation period, where the authorization itself makes payment of dues a quid pro quo for union membership. The judge concluded that the authorization in this case did make payment of union dues a quid pro quo for union membership.⁵ The judge accordingly found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by attempting to cause the Employer to withhold the dues of the Charging Party after he had effectively resigned from the Respondent.

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,⁶ issued today, the Board acknowledged judicial criticism of the *Eagle Signal* analysis⁷ and set forth a new test for determining the effect of an employee's resignation from union membership on that employee's dues-checkoff authorization. The Board in *Lockheed* found that an employee may volun-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The checkoff authorization card signed by Dugger provides:

Pursuant to this authorization and assignment, please deduct from my pay each month, while I am in employment with the collective bargaining unit in the Company, and irrespective of my membership status in the Union, monthly dues, assessments and (if owing by me) an initiation fee each as designated by the International Treasurer of the Union.

.....

This assignment and authorization shall be effective and cannot be cancelled for a period of one (1) year from the date appearing above or until the termination date of the current collective bargaining agreement between the Company and the Union, whichever occurs sooner.

I hereby voluntarily authorize you to continue the above authorization and assignment in effect after the expiration of the shorter of the periods above specified, for further successive periods of one (1) year from such date. I agree that this authorization and assignment shall become effective and cannot be cancelled by me during any of such years, but that I may cancel and revoke by giving the appropriate management representative of the plant in which I am then employed, an individual written notice signed by me and which shall be postmarked or received by the Company within fifteen days following the expiration of any such year or within

the fifteen days following the termination date of any collective bargaining agreement between the Company and the Union covering my employment if such date shall occur within one of such annual periods. Such notice of revocation shall become effective respecting the dues for the month following the month in which such written notice is given; a copy of such notice will be given by me to the Financial Secretary of the Local Union.

³ The record indicates that the Respondent did not immediately notify Dugger of its acceptance of his resignation.

⁴ 268 NLRB 635 (1984).

⁵ The judge additionally found that "[t]he full record gives the impression that Respondent knew full well that Dugger was trying to revoke his checkoff authorization on April 14." The testimony at the hearing does not support this finding, and we do not adopt it. The record reveals that on April 14 Dugger did not notify Local 4671 of his desire to revoke his dues checkoff and that it was not until some unspecified date subsequent to April 14 that Dugger first communicated to union officials a desire to stop paying dues. The record does not establish that the communication occurred during the 15-day escape period specified in the authorization.

⁶ 302 NLRB 322 (1991).

⁷ See *NLRB v. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987).

tarily agree to continue paying union dues pursuant to a checkoff authorization even after resignation of union membership. In fashioning a test to determine whether an employee has in fact agreed to do so, the Board recognized the fundamental policies under the Act guaranteeing employees the right to refrain from belonging to and assisting a union, as well as the principle set forth by the Supreme Court that waiver of such statutory rights must be clear and unmistakable.⁸ In order to give full effect to these fundamental labor policies, the Board stated that it would:

construe language relating to a checkoff authorization's irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's exception or on the expiration of the existing collective-bargaining agreement—as pertaining only to the *method* by which dues payments will be made *so long as dues payments are properly owing*. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis. Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. [302 NLRB at 328–329.]⁹

Applying the analysis of *Lockheed* to the facts in this case, we find that the Respondent has shown that the dues-checkoff authorization signed by the Charging Party obligated him to pay dues after his effective resignation from membership in Local 4671. Dugger authorized the Employer to

please deduct from my pay each month, while I am in employment with the collective bargaining unit in the Company, and irrespective of my membership status in the Union, monthly dues, assessments [Emphasis added.]

We find that Dugger thus clearly authorized the continuation of his dues deduction even in the absence of union membership. Because there is explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership, dues were still owing under Dugger's checkoff authorization after his resignation of membership. Inasmuch as Dugger continued to have a dues obligation after April 14, 1989, and as his July 20, 1989 attempted revocation of his checkoff authorization was not timely, we conclude that Local 4671 did

not violate the Act by attempting to cause the Employer to withhold dues from the wages of the Charging Party after his effective resignation of union membership. We shall therefore dismiss the complaint.

ORDER

The complaint is dismissed.

Elizabeth Kilpatrick, Esq., for the General Counsel.
Bruce A. Fickman, Esq., of Dallas, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Ft. Worth, Texas, on December 15, 1989. The charge was filed on September 6, 1989. An amended charge issued on December 1, 1989, alleging that Respondent violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).

Respondent admitted the commerce and jurisdictional allegations of the complaint. In view of that admission, I find that National Oil Well, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find, on the basis of Respondent's admission, that it is a labor organization within the meaning of Section 2(5) of the Act.

During the hearing the parties stipulated to the following:

At material times United Steelworkers of America, AFL–CIO, CLC (the Union) has been the exclusive bargaining agent for certain employees of National Oil Well, Inc. (the Employer), including the Charging Party (Dugger) for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The current collective-bargaining agreement between the Employer and the Union has a term from November 1, 1988, to April 30, 1992, and provides that the employees of the Employer may authorize the Employer to deduct initiation fees and regular monthly dues from their wages and remit them to the Union's International treasurer.

Respondent is the local chartered by the Union for employees it represents at the Employer's Garland, Texas facility for the purpose of administering the collective-bargaining agreement.

Although there is a dispute as to the date of receipt—i.e., Respondent contends they received the following document on May 1, 1989, while the General Counsel contends Respondent received it on April 14, 1989—the parties stipulated that Respondent received the following letter:

4–14–1989

Randall Franks
President, USWA Local 4671

Mr. Franks,

I, Calvin Dugger, respectfully request that my membership in United Steelworkers Local 4671 be terminated as of my one year (1) anniversary date.

I am doing this because of my feelings about several different issues. These issues include philosophical dif-

⁸ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

⁹ In *Lockheed*, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. In the absence of a union-security clause requiring union membership here, the *Lockheed* test is applicable to this case.

ferences with the International as well as the Local Organizations.

As a non-member, I will strive to maintain silence as far as commenting on your Union and the way it handles it's business.

I do believe a Union is often-times necessary in the Work-Place. If at a later date, I feel that USWA & Local 4671 are accomplishing that purpose, I will reconsider my decision.

Respectfully yours,
/s/ Calvin Dugger
#3167

Calvin Dugger testified regarding delivery of the above letter, that it was approximately April 14, 1989, and,

I went to approach Mr. Bailey or Mr. Franks, preferably Mr. Bailey because he seems to run things, and couldn't find any of the Union officials available. I went to my foreman, who happens to be their foreman also, and approached him about where they were. I was told they were in a Union meeting with the Company, I assume, and he did not know when they would return. At that time, I handed the letter to him and asked him if he was going to stay late and he said yes he was. And, since he was their foreman, our time-keeping procedure makes it such that he has to check those people out when he leaves . . . before he leaves. And I knew that he would . . . he would be checking them out, so I asked him if he would deliver the letter for me because time was beginning to become an element, my shift ending at 3:00 o'clock.

. . . .
I witnessed him handing a letter to Mr. Franks or Mr. Bailey, I can't recall which, at . . . I recall it being about five minutes to 3:00 on that same day.

Dugger's foreman, Ken Hutchinson, testified as follows regarding Dugger's April 14 letter:

Mr. Dugger delivered to me an open letter and asked that I deliver it to Mr. Randall Franks, the President of the Union. And, as I recall, I read the letter. I read the letter. And he wanted an envelope to put it in, said he thought it should be in an envelop.

. . . .
Q. Do you recognize this? Marked GC Exhibit #2?
A. Yes, that's the letter.

Q. How long after Mr. Dugger gave you the letter did you actually deliver it?

A. I would say it was actually approximately about five minutes. Somewhere in that neighborhood. It wasn't long. I turned around, after Calvin gave me the letter, and I was walking back to the office, and I noticed that Mr. Franks was standing talking to someone. I don't remember who. And I just walked up and said Mr. Dugger wanted you to have this. He just took it and said okay and I left him.

. . . .
The exact date I really didn't key in. I know that Mr. Dugger had stated that that letter had to be turned in

in a timely fashion for some reason as far as the Union was concerned. So I know it was in April, and it was toward the middle of April. It was on a Friday. I remember that.

An examination of the calendar shows that April 14, 1989, did fall on a Friday.

Jay Bailey, vice president and chairman of the grievance committee, for Respondent, testified that he actually runs Respondent because the president, Randall Franks, has health problems. Bailey and Michael Callahan, recording secretary and grievance committeeman, testified that the Union received Dugger's April 14 letter on Monday, May 1, 1989. Bailey and Callahan testified that they received Dugger's letter while in a meeting with the Employer but both admitted that they had a number of similar meetings with the Employer. According to Bailey, Respondent accepted the letter as Dugger's resignation from the Union. As to whether this was communicated to Dugger, Bailey testified,

At one point in time Mr. Dugger asked me a question, why is his dues still being withheld. At that point, he wanted to know why he was still being a member, why he was still being forced to be a member of Local 4671. I informed Mr. Dugger at that meeting, which was not a meeting called over that, it was just a representing of another individual in the area, that as far as I was concerned he was not a member and if he had any problems with his dues being deducted he needed to consult Bob McCreary. I wasn't holding him out.

Bailey testified on cross-examination:

My decision was not . . . well, it was our decision, that we did not have the authority to stop Mr. Dugger's dues. We did have the authority to stop his membership, and we did so.

. . . .
Had this letter have said that he was requesting his dues to be ceased, we would have given it further consideration. This particular letter only asked for resignation of his membership.

Dugger never heard from the Union. The Employer has continued to withhold dues from Dugger's pay.

Dugger testified:

I had talked to Mr. Bailey about it, why the dues were still being taken out. On one occasion he stated that that was something I needed to take up with Mr. McCreary. I think that occasion would have been sometime around the 20th of July 1989. At that time, I hand wrote another letter to Mr. McCreary and delivered a copy to him and the Plant Superintendent, Mr. Nicholson,

The parties also stipulated that Respondent received the following. Originally they disagreed as to date of receipt. Respondent, during the stipulation, indicated that they could not place the time of receipt but that it was after July 20, 1989, and that it was believed to have been received in the September 1989 timeframe. However, as shown below, Respondent subsequently agreed to accept testimony showing that Re-

spondent was sent a copy of the letter by the Employer around July 20:

7-20-1989

Mr. Bob McCreary
Director of Personnel
National Oil Well
Garland Plant

Mr. McCreary,

On April 14, 1989, I had a letter hand delivered to officials of Local Union #4671. In this letter, I stated my desire to resign my membership in the United Steelworkers of America and its local branch # 4671.

My reasons for resigning were stated in this letter, of which Mr. Randall Franks or Mr. J. Bailey should have a copy.

I am now asking you, as a representative of National Oil Well, to arrange for a cessation of *Dues Payments* to Local 4671 and the United Steelworkers of America as quickly as Texas and Federal Law allows. If payments cannot be stopped within the next several weeks, please inform me so that I can take appropriate actions.

If you have any questions please contact me either while I am at work or you can call me at home. Thank you for your timely assistance in this matter.

Sincerely,
Calvin E. Dugger
/s/ Calvin E. Dugger
Clock #316

c.c.: Mr. J. Nicholson
Mr. J. Lovett

Dugger testified that he wrote the above letter on July 20, 1989, and gave it to Mr. McCreary on

that same day or two or three days later. Seemed like I tried to catch him that day and couldn't catch him, and it was . . . it could have been several days later from that point. It wasn't over three or four days later.

According to Dugger, when he gave the letter to McCreary, McCreary read the letter, went and pulled Dugger's personnel file to get a copy of Dugger's checkoff authorization, and read the card to Dugger. McCreary told Dugger that

unless I specifically stated that I wanted my dues to be revoked that he couldn't be a lot of help for me.

On cross-examination Dugger admitted that he did not deliver a copy of the letter to Respondent's financial secretary. Dugger also recalled that McCreary indicated that he could not stop the dues checkoff because Dugger had not made a timely request to have the dues stopped.

Robert McCreary, the Employer's manager of human resources, testified that he is the appropriate official of the Employer designated to receive letters revoking dues checkoff. McCreary confirmed Dugger's testimony regarding receiving Dugger's July 20, 1989 letter. McCreary was asked if it was customary for him to copy letters such as Dugger's to the Union and he responded:

Any letter like this that I received I would give [the Respondent] a copy of it, yes.

The parties stipulated that the anniversary date of Dugger's checkoff authorization was April 14.

Dugger's checkoff authorization includes the following language:

Pursuant to this authorization and assignment, please deduct from my pay each month, while I am in employment with the collective bargaining unit in the Company, and irrespective of my membership status in the Union, monthly dues, assessments and (if owing by me) an initiation fee each as designated by the International Treasurer of the Union.

. . . .

This assignment and authorization shall be effective and cannot be cancelled for a period of one (1) year from the date appearing above or until the termination date of the current collective bargaining agreement between the Company and the Union, whichever occurs sooner.

I hereby voluntarily authorize you to continue the above authorization and assignment in effect after the expiration of the shorter of the periods above specified, for further successive periods of one (1) year from such date, I agree that this authorization and assignment shall become effective and cannot be cancelled by me during any of such years, but that I may cancel and revoke by giving the appropriate management representative of the plant in which I am then employed, an individual written notice signed by me and which shall be postmarked or received by the Company within fifteen days following the expiration of any such year or within the fifteen days following the termination date of any collective bargaining agreement between the Company and the Union covering my employment if such date shall occur within one of such annual periods. Such notice of revocation shall become effective respecting the dues for the month following the month in which such written notice is given; a copy of such notice will be given by me to the Financial Secretary of the Local Union.

A staff representative of the Union testified that the above authorization card has been used because of National Labor Relations Board rulings that resignation from union membership operates by law as revocation of dues checkoff where the authorization itself makes payment of dues a quid pro quo for union membership.

Discussion

The evidence regarding the date the Union received Dugger's letter dated April 14, 1989, is in dispute. The testimony of Dugger and Foreman Hutchinson indicates that the letter was given to Respondent's president, Franks, on or near April 14. Two of Respondent's officials, Bailey and Callahan, testified that they saw Foreman Hutchinson give the letter to Respondent at a meeting on May 1, 1989. President Franks did not testify.

I credit the testimony showing that the Union President received Dugger's letter on or about April 14, 1989. The testimony of Dugger who recalled seeing Hutchinson give the

letter to either President Franks or Vice President Bailey, around April 14, and Hutchinson, who testified that he gave the letter to Franks on a Friday in mid-April, was not specifically rebutted by Respondent's evidence. President Franks, who was given the letter, did not testify. Therefore, I credit the testimony of Dugger and Hutchinson. Whether Hutchinson also gave the letter to Respondent at a meeting on May 1 is not dispositive of whether he gave the letter to Franks on April 14.

Findings

No one disputes that Dugger's April 14 letter was his resignation from the Union. What is in dispute is whether that letter, along with, if necessary, the July 20 letter, also rescinds Dugger's dues checkoff.

Respondent's attorney stated that it was Respondent's position that the April 14 letter

is not revocation of the check-off authorization but was a resignation from membership. Under the Union's understanding of the facts, the resignation of membership was received by the Union on May 1, 1989 and was accepted as a resignation of membership. If it is viewed as General Counsel contends, the revocation of the check-off authorization also, if it was on May . . . April 14th, 1989, that would be within the 15 day escape period, annual escape period. If it is on May 1 it is not within the 15 day escape period as provided in the check-off authorization card.

As shown above, I credit evidence showing that Respondent received Dugger's letter on April 14, 1989.

In view of those credibility findings, the timeliness question has been resolved as to the April 14 letter. As to the question of timeliness, the April 14 letter was received by the Respondent within the time period specified on Dugger's dues-checkoff authorization.

As to the significance of the July 20 letter to the Employer, Respondent's attorney stated on the record that Respondent accepted McCreary's testimony on the point of McCreary giving Respondent a copy of Dugger's July 20 letter. The testimony of McCreary proves that Respondent did receive a copy of the letter near July 20, 1989.

In regards to the significance of the July 20 letter, Respondent's attorney stated on the record

it is our position that this is Mr. Dugger's first attempt to revoke the check-off authorization and it is untimely. It is beyond the 15 day escape period.

In view of my credibility findings, the issues may be presented as follows:

As to the April 14 letter, that letter was received by Respondent within the time limitations included in Dugger's dues-checkoff authorization. Therefore, as to that letter, the sole question remaining is one of whether the letter constitutes a dues-checkoff rescission.

As to the July 20 letter, that letter is a clear attempt by Dugger to rescind his dues checkoff. However, that letter was received by the Employer, and by Respondent, around July 20. July 20 is clearly outside the time limitations included in Dugger's dues-checkoff authorization.

Although there are some additional points argued by the parties, the basic question revolves about the April 14 letter which was timely but failed to include in specific language, that it was a checkoff rescission as well as a resignation; and the July 20 letter which stated in specific language that it was a dues-checkoff rescission, but was not timely.

In consideration of Dugger's April 14 resignation, the question here goes to whether that letter constitutes a dues-checkoff revocation:

On the question of the revocation of the dues-checkoff authorization, the Board has stated that a resignation from membership in a union will serve to revoke a checkoff authorization, even absent a revocation request, where the authorization itself makes payment of dues a quid pro quo for union membership. *Hearst Corp.*, 281 NLRB 764, 765 (1986).

In regard to the question of resignation from membership see *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); and *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).

Here, the Union took steps to ensure that the check-off authorization did not make "payment of dues a quid pro quo for union membership."

The language of Dugger's dues-checkoff authorization provides for deduction from his pay "irrespective of my membership status in the Union, monthly dues, assessments and (if owing by me) an initiation fee"

It is now clear what the Union was attempting to accomplish by the above language. However, from the standpoint of the member (employee), the above language is somewhat confusing. In fact, it is somewhat confusing to me even though I understand the Union's objective.

The checkoff authorization provides "irrespective of union membership." However, it goes on to provide for the deduction of "monthly dues, assessments and (if owing by me) an initiation fee" As shown above, the parties' stipulation shows that the current collective-bargaining agreement also provides for the deduction of monthly dues, as well as initiation fees, from pay, on proper authorization.

There was no showing that Dugger owed assessments or initiation fees. As to "monthly dues," there was no showing that language could involve anything other than membership dues.

Dugger executed the dues checkoff at the time he became a member of Respondent, April 14, 1988. Obviously, when he executed the checkoff at the same time, the term "monthly dues" implied monthly membership dues.

I am convinced, despite the efforts of the Union to divorce the checkoff from language in current court and Board decisions, Dugger's checkoff authorization and the current collective-bargaining agreement, equate dues as a quid pro quo of membership. Anyone, espe-

cially anyone unfamiliar with the law regarding check-off, would have difficulty understanding the term “monthly dues” to involve anything other than membership dues.

It appears that Respondent went out of its way to take advantage of any confusion by Dugger. When Dugger questioned Jay Bailey about his effort to resign, Bailey refused to help him beyond, eventually, a cryptic comment that Dugger should see the Employer’s representative if he had a problem with checkoff.

The full record gives the impression that Respondent knew full well that Dugger was trying to revoke his checkoff on April 14. Rather than trying to clear the air and assist him in his goal, Respondent’s agents tried to delay matters by first pretending that they were unaware of Dugger’s resignation letter until after the checkoff deadline, then, thereafter, refusing to cooperate by not fully responding to Dugger’s questions about why the dues continued to be deducted from his pay.

I find that Respondent engaged in violative conduct by causing the Employer to continue to deduct dues checkoff from Dugger’s pay. See *Letter Carriers (Postal Service)*, 283 NLRB 644 (1987); *Food & Commercial Workers Local 425 (Hudson Foods)*, 282 NLRB 1413 (1987).

CONCLUSIONS OF LAW

1. National Oil Well, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause the Employer to withhold the dues of employees who had effectively resigned from the Respondent when the employee’s dues-checkoff authorization was in consideration for union membership, the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act. I recommend that Respondent be ordered to make Calvin Eugene Dugger whole for monetary losses he suffered by reason of Respondent’s unlawful refusal to honor his revocation of dues-checkoff assignment. Those amounts are to be computed in the manner consistent with the Board policies stated in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]